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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/314,052	05/18/1999	DOUGLAS E. OTT	15006.0009	4618

7590 03/24/2003

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EXAMINER

THOMPSON, MICHAEL M

ART UNIT	PAPER NUMBER
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3763

DATE MAILED: 03/24/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/314,052

Applicant(s)

OTT ET AL.

Examiner

Michael M. Thompson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 June 2002.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5, 39-54 and 72-81 is/are pending in the application.
- 4a) Of the above claim(s) 39-54 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 72-81 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 15.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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DETAILED ACTION***Double Patenting***

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-5 and 72-81 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-42 of U.S. Patent No. 6,068,609 in view of Grimm et al. (4,303,601). Although the conflicting claims are not identical, they are not patentably distinct from each other because both teach an apparatus for treating a gas comprising a housing defining one chamber having an entry port and an exit port, the chamber that contains a volume of liquid in fluid communication with the insufflator, a humidifying means, a container/reservoir, the device comprising an opening, and a port for filling the container/reservoir, and at least one layer of filter/membrane in the chamber for filtering the gas, water retaining layers and the pre-charging of those layers. He teaches the use of a humidity sensing means and monitoring means to sense and monitor the relative humidity of the gas and act accordingly to maintain that humidity and/or temperature to include a control means for controlling electrical power. While Ott et al. clearly suggests the use of a back-up container or reservoir, Ott et al does not specifically recite the container/reservoir or any tubing in the claims.

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Grimm et al. teaches a humidifying apparatus to humidify gases for medical administration having a back-up container or reservoir bag with flexible tubing connected to a port in the closure to supply water to the humidifier element. It would have been obvious to one of ordinary skill in the art, at the time of invention to have modified the humidifying apparatus for conditioning gases with the a back-up container or reservoir bag with flexible tubing connected to a port as taught by Grimm et al. for the well known purpose of providing optimum humidification operation of the device of the instant invention.

3. Claims 1-5 and 72-81 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 34-100 of copending Application No. 09/363,234. Although the conflicting claims are not identical, they are not patentably distinct from each other because both teach an apparatus for treating a gas comprising a housing defining one chamber having an entry port and an exit port, the chamber that contains a volume of liquid in fluid communication with the insufflator, a humidifying means, a container/reservoir, the device comprising an opening, and a port for filling the container/reservoir, and at least one layer of filter/membrane in the chamber for filtering the gas, water retaining layers and the pre-charging of those layers. He teaches the use of a humidity sensing means and monitoring means to sense and monitor the relative humidity of the gas and act accordingly to maintain that humidity and/or temperature to include a control means for controlling electrical power and a back-up container/reservoir.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

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Contacts

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Michael Thompson whose telephone number is (703) 305-1619. The Examiner can normally be reached on Monday through Friday from 9 am to 5 PM.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Primary, Brian Casler, can be reached on (703) 308-3552. The official fax phone number for submissions to the organization where this application or proceeding is assigned is (703) 872-9302. The official fax phone number for submission of After Final response is (703) 872-9303.

Michael M. Thompson

Patent Examiner


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MT 

March 17, 2003.